



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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JUN 4 4 53 PM '97

**SENSITIVE**

JUN 10 1997

**EXECUTIVE SESSION**

June 4, 1997

**MEMORANDUM**

TO: The Commission

FROM: Lawrence M. Noble *LMN*  
General Counsel

SUBJECT: Request to Place on the Agenda the General Counsel's Report  
in MUR 3774 (National Republican Senatorial Committee)

The attached General Counsel's Report contains a recommendation concerning the U.S. District Court's May 30, 1997 order granting complainant Democratic Senatorial Campaign Committee's motion for summary judgment in the pending Section 437g(a)(8) suit in this matter, DSCC v. FEC, Civ. A. No. 96-2184 (D.D.C.) (JHG).

In light of the court's order, we request that this matter be placed on the June 10, 1997 Executive Session agenda. A related memorandum from the Litigation Division containing further recommendations regarding the order will be circulated separately.



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *fc3*

DATE: June 4, 1997

SUBJECT: MUR 3774-Memo to the Commission

The attached is submitted as an Agenda document for the Commission Meeting of June 10, 1997

Open Session \_\_\_\_\_  
Closed Session \_\_\_\_\_ X

CIRCULATION

72 Hour Tally Vote ☐  
Sensitive ☐  
Non-Sensitive ☐

24 Hour Tally Vote ☐  
Sensitive ☐  
Non-Sensitive ☐

24 Hour No Objection ☐  
Sensitive ☐  
Non-Sensitive ☐

Information ☐  
Sensitive ☐  
Non-Sensitive ☐

Other ☒  
Sensitive-Circulate on Blue paper

DISTRIBUTION

Compliance ☒

Audit Matters ☐

Litigation ☐

Closed Letters ☐  
MUR ☐  
DSP ☐

Status Sheets ☐

Advisory Opinions ☐

Other (See Distribution below)

BEFORE THE FEDERAL ELECTION COMMISSION

JUN 4 4 58 PM '97

In the Matter of

National Republican Senatorial Committee and  
Stan Huckaby, as treasurer, *et al.*

MUR 3774

GENERAL COUNSEL'S REPORT

**I. BACKGROUND**

This case involves a complaint-generated matter filed by the Democratic Senatorial Campaign Committee ("DSCC") in 1993 and supplemented in 1995, alleging that the National Republican Senatorial Committee ("NRSC") violated the Act and Commission regulations by funneling funds from one of its non-federal accounts to certain non-profit organizations for the purposes of influencing specific U.S. Senate elections in 1992 and 1994.<sup>1</sup> This matter was activated on March 8, 1995, and on August 1, 1995, the Commission found reason to believe that the NRSC, the four organizations who received the NRSC's funds, and two other entities, violated the Act and Commission regulations.<sup>2</sup> At the same time, the Commission instituted an investigation.

<sup>1</sup> Responses to the Commission's reason to believe findings and interrogatories revealed that in addition to the three U.S. Senate elections noted in DSCC's complaints, the 1993 special U.S. Senate election in Texas and six other 1992 U.S. Senate elections were targeted by the groups who received the NRSC's funds.

<sup>2</sup> Based on the DSCC's original and supplemental complaint, a total of 19 individuals and entities were named as respondents in this matter.

On February 22, 1995, two weeks before this matter was activated, the DSCC filed a suit in federal district court, pursuant to 2 U.S.C. § 437g(a)(8), seeking declaratory and injunctive relief against the Commission for failing to act on DSCC's original administrative complaint. *DSCC v. FEC*, Civil Action No. 95-0349 (D.D.C.) (JHG). On April 17, 1996, the District Court held that the Commission's failure to take any meaningful action on DSCC's 1993 complaint until almost 600 days after the complaint was filed was contrary to law. *DSCC v. FEC*, Civ. A. No. 95-0349 (D.D.C. April 17, 1996) ("*DSCC I*"). At the same time, the court declined to set a specific time frame for completion of the investigation but acknowledged that DSCC could file a new action if necessary. *DSCC I*, slip. op. at 20.

DSCC filed a second civil action on September 20, 1996, again seeking declaratory and injunctive relief against the Commission for failing to act on DSCC's complaints. *DSCC v. FEC*, Civil Action No. 96-2184 (D.D.C.) (JHG) ("*DSCC II*"). After briefings on DSCC's simultaneous motion for summary judgment, an interim order in which the court required the Commission to file monthly status reports and status hearings, the District Court issued an opinion and order on May 30, 1997 concluding that the Commission's failure to investigate and make a probable cause finding within four years from when DSCC filed its original complaint is contrary to law. *DSCC II* (May 30, 1997), slip. op. at 13, 14. Attachment 1.

## **II. COURT ORDER IN *DSCC V. FEC* (*DSCC II*)**

The District Court's May 30, 1997 opinion and order in *DSCC II* declares that the Commission's "failure to take meaningful action in a reasonable time frame to investigate

and make a 'probable cause' determination" with respect to DSCC's complaints is contrary to law. Attachment 1 at 13 and 14. The Court further orders that the Commission conform its conduct with the court's declaration within 30 days, and states that should the Commission fail to do so, the DSCC may bring a civil action to remedy the violation involved in the original complaint pursuant to 2 U.S.C. § 437g(a)(8)(C). Attachment 1 at 14.

Since the order appears to require the Commission to make a probable cause to believe determination within 30 days, briefs would have to be prepared giving Respondents at least 15 days to respond, a General Counsel's Report would have to be written and the Commission would have to vote on whether or not there is probable cause to believe that Respondents violated the Act and Commission regulations.<sup>3</sup> The foregoing would all have to be completed by June 30, 1997. However, as noted in this Office's last report to the Commission in this matter, General Counsel's Report dated May 14, 1997, the investigation is still ongoing.<sup>4</sup> Even if this Office were to forego

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<sup>3</sup> Another possible course of action would be to just dismiss the case with no further action. The Office of General Counsel does not recommend this option at this time. This question can be revisited should the DSCC get a private right of action and sue Respondents.

<sup>4</sup> Since the last report to the Commission, two more depositions have been taken and two are currently scheduled for June. Depositions of at least eight key NRSC, Coalitions for America ("CFA"), NRLC ("National Right to Life Committee") and Massachusetts Citizens Concerned for Life ("MCCL") staff are yet to be scheduled. Scheduling of the NRLC/MCCL depositions has been complicated by the fact that counsel representing NRLC/MCCL is currently involved in a heavy deposition schedule in the Christian Coalition litigation and has stated that he will be unavailable for depositions in this matter before July 11. Counsel for CFA informed this Office on June 2 that he will not produce CFA president, Eric Licht for deposition without a court order directing Licht to appear, thus necessitating a subpoena enforcement action that the Commission has already approved. Similarly, a subpoena enforcement action was filed

depositions of key individuals such as former NRSC personnel Curt Anderson and Paul Curcio, we are still awaiting transcripts for depositions already taken. Given these practical constraints, it would be impossible for the Commission to make a probable cause determination, based on the evidence, within the allowable time. Accordingly, this Office recommends that the Commission notify the District Court that it will be unable to conform to its declaration by making a probable cause determination within 30 days.

As a consequence of failing to conform to the court's order, it is theoretically possible that the court could hold the Commission in contempt. However, impossibility of compliance is a valid defense for contempt. Moreover, since the Order itself explicitly sets forth a remedy in the event the Commission fails to conform to the order -- giving DSCC a private right of action -- it does not appear likely that a contempt ruling would be made. Attachment 1 at 14.

In addition to notifying the court that the Commission cannot conform to its Order, this Office also recommends, via a separate memo prepared by the Litigation Division, that the Commission request a stay and seek appeal of the court's order in *DSCC II*.

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(Footnote 4 continued from previous page)

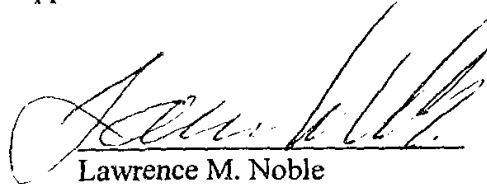
June 2 that he will not produce CFA president, Eric Licht for deposition without a court order directing Licht to appear, thus necessitating a subpoena enforcement action that the Commission has already approved. Similarly, a subpoena enforcement action was filed against witness National Right To Work Committee ("NRTWC") on May 30, 1997 and awaits a June 10 court hearing. No subpoena enforcement suits have yet been filed against Respondents NRLC, NRL PAC, MCCL or MCCL PAC pending negotiations with counsel.

In the meantime, this Office plans to continue with the investigation in this matter, subject to periodic review in light of further actions taken by the District Court and/or DSCC.

### **III. RECOMMENDATION**

Notify the District Court in *DSCC v. FEC*, Civ. A. No. 96-2184, that the Commission will be unable to conform to the court's May 30, 1997 order within 30 days and of the Commission's decision regarding an appeal of that order.

6/4/97  
Date

  
Lawrence M. Noble  
General Counsel

Attachment  
May 30, 1997 Order in *DSCC II*

Staff Members Assigned: Dawn Odrowski

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL  
CAMPAIGN COMMITTEE,

Plaintiff.

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 96-2184 (JHG)

**UNDER SEAL<sup>1</sup>**

MAY 30 3 43 PM '97

**MEMORANDUM OPINION AND ORDER**

Presently pending is Plaintiff Democratic Senatorial Campaign Committee's motion for summary judgment. This action, like its predecessor suit, *Democratic Senatorial Campaign Committee v. Federal Election Commission*, Civ. A. No. 95-0349 (JHG) (D.D.C. Apr. 17, 1996) ("*DSCC I*"), stems from the DSCC's allegations in an administrative complaint filed with the Federal Election Commission ("FEC") that the National Republican Senatorial Committee ("NRSC") was engaging in a concerted effort to violate campaign spending laws by illegally laundering "soft money" through various right-wing non-profit organizations. For the reasons stated below, the motion will be GRANTED. In accordance with Fed.R.Civ.P. 58, judgment shall be entered separately.

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<sup>1</sup> This Memorandum Opinion has been filed under seal for ten days, because it may contain information and may refer to documents that the FEC is prohibited from making public except pursuant to 2 U.S.C. § 437g(a)(12) (1994). The seal will be lifted in ten days unless, consistent with ¶III.4 of the Protective Order issued on Nov. 25, 1996, the parties advise the Court which, if any, information should remain under seal.

## I. Background

The following facts are not in dispute. On May 14, 1993, the DSCC filed an administrative complaint against the NRSC with the FEC alleging the expenditure of illegal "soft money" for the purpose of influencing federal Senate elections. In February of 1995, the DSCC filed a supplemental complaint with the FEC in which it made similar allegations against the NRSC with respect to the 1994 election cycle. When the FEC failed to act on its administrative complaints, the DSCC filed suit in this Court.

On April 17, 1996, in *DSCC I*, this Court granted summary judgment in favor of the DSCC, holding that the FEC's failure to act was contrary to law. The Court noted that even though the FEC had classified the DSCC's administrative complaint as a high priority matter, it had not even bothered to assign an enforcement attorney almost 2 years after the complaint was filed. *See DSCC I*, slip. op. at 12. Moreover, the FEC took almost 27 months to make its "reason to believe" determination. *See id.* This Court's holding was principally based upon the FEC's failure "to take any meaningful action on DSCC's administrative complaint until almost 600 days after the complaint was filed." *Id.* at 1.

The Court did not, however, set a specific time frame within which she would require the FEC to complete its investigation due to the traditional deference that courts owe to law enforcement agencies exercising their prosecutorial prerogatives. Stating that the DSCC's civil complaint apparently had served as a catalyst to prod the agency forward, the Court noted that, on August 1, 1995, approximately five months after an

enforcement attorney had been assigned and six months after the civil complaint was filed in this Court, the FEC Commissioners voted 5-1 that "reason to believe" existed that the NRSC had violated the law. An investigation was then initiated, and the Court could find no evidence to indicate that the agency's investigation was not proceeding properly:

There has been no evidence that the FEC has failed to act reasonably in the investigation of the complaint since the "reason to believe" determination was made. Indeed, that investigation is underway and may be nearing completion. It is reasonable to expect that given the extraordinary delay, the FEC will accelerate the process to provide timely and meaningful relief. While setting precise limits on an agency investigation is not a matter in which the Court will engage lightly, should the FEC fail to act reasonably in completing its investigation, the need for additional judicial intervention may well be compelling. There is little doubt that DSCC would move promptly, by instituting a new but related action, if necessary to ensure the completion of this investigation.

*Id.* at 20.

Shortly before the 1996 national elections, Plaintiff DSCC filed this case and immediately sought summary judgment, contending that the FEC's investigatory delay was arbitrary and capricious, and contrary to law. The Court rejected the DSCC's arguments last fall and again declined to order the FEC to complete its investigation and bring an enforcement action against the NRSC in thirty days. See Order at 3-5 (Nov. 25, 1996) [Docket No. 23]. The Court also rejected the DSCC's alternative request to authorize it to proceed directly against the NRSC pursuant to 2 U.S.C. § 437g(a)(8). *Id.* at 4. After reviewing a chronology of the FEC's investigatory steps since its "reason to believe" determination fifteen months earlier, the Court held that the FEC's actions did

not yet constitute a failure to act under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*), and *Rose v. FEC*, 806 F.2d 1081, 1091-92 n.17 (D.C. Cir. 1986). *Id.* at 3. However, the Court did state that

the pressures resulting from resource constraints, competing priorities or complex issues do not provide the FEC, or any federal agency, with *carte blanche* to avoid its statutory obligations, particularly where the DSCC is threatened with being denied meaningful relief as the end of the statute of limitations period approaches and will soon be imminent. This Court has been thrust in the role to ensure that the FEC fulfills its statutory obligations in this suit, and she will do so. However, at this point, the Court will, once more, allow the FEC an opportunity to act promptly and finally; failure to do so will require action by the Court.

*Id.* at 4.

Upon denying the motion for summary judgment without prejudice, this Court then ordered the FEC to file monthly status reports describing its investigatory actions.

*Id.* at 5.

On December 10, 1996, the FEC filed its first monthly status report, which stated final revisions were being made to a voluminous (i.e., 83-pages) General Counsel's Report to the Commissioners detailing the facts then known to the Commission in connection with the plaintiff's complaint and proposing discovery for the Commissioners' approval. "It [was] anticipated that the report [would] be circulated to the Commission for consideration at the next Commission executive session, currently scheduled for January 7, 1997." First Status Report at 2.

On January 10, 1997, the FEC filed its second monthly status report, stating that "The General Counsel's Report discussed in the Commission's prior filings was

circulated to the Commission on January 8, 1997 for consideration at the next Commission executive session, currently scheduled for January 14, 1997." Second Status Report at 1-2.

On February 10th, the FEC's thirdly monthly status report advised the Court that the Commissioners had considered the General Counsel's report on February 4, 1997, and "approved the issuance of Subpoenas to produce documents and Orders to submit written answers to questions to fifteen persons and entities. In addition, the Commission approved the issuance of subpoenas for depositions to twenty-three individuals." Third Status Report at 1-2.

On March 10th, the FEC reported that fifteen subpoenas had been issued (of which one recipient had moved to quash). The FEC also stated that two additional enforcement attorneys had been assigned to the case. "These staff members, and two paralegals, currently are reviewing documents *already on file with the Commission and performing other tasks in preparation for their participation in this matter, such as the anticipated depositions.*" Fourth Status Report at 2.

On March 18, 1997, having waited four additional months and four monthly status reports, the DSCC again filed for summary judgment, arguing that the FEC's "near glacial pace" in conducting the investigation was unreasonable and contrary to law. See DSCC's Motion for Summary Judgment at 2. "Four years should be more than enough time to find probable cause." DSCC's Reply at 2 (emphasis in original). The DSCC states that "[a]s a result of this slow pace and the two year delay in assigning the case to

an attorney in the first place, it now appears highly unlikely that the Commission will be in a position to initiate an action against the NRSC within the five year statute of limitations period." *Id.*<sup>2</sup> Noting that it took four months from when the FEC was completing final revisions on the General Counsel's Report until the Commissioners reviewed it, the DSCC contends that:

[t]he Commission's handling of this report -- a report that it boasted evidenced its commitment to investigating this matter -- typifies the Commission's overall performance in this matter. With less than eight months left the DSCC can no longer wait for the Commission and thus immediate relief is required.

DSCC's Mot. for Sum. Judgment at 7.

In opposition, the FEC contends that, contrary to the DSCC's claims, the investigation is moving forward and that it is "conducting a careful and deliberate investigation of constitutionally sensitive and factually complex issues arising from a national party's payments to independent issue advocacy groups." FEC's Opposition at 2. Noting that were the Court to grant the relief requested by the DSCC, it would be deprived of the time necessary to complete its investigation, the FEC argues that "[i]f the Commission does not have sufficient time to complete its investigation and make a careful examination of the information obtained in response to [its] subpoenas and depositions, it may be impossible for the Commission to make an informed judgment as

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<sup>2</sup> At the Status Conferences of March 19, 1997, and May 21, 1997, FEC counsel advised the Court that the FEC probably would not be in a position to bring an enforcement action against the NRSC and other respondents before October of 1997--the expiration of the applicable statute of limitations.

to whether there is probable cause to believe a violation has occurred. If the Commission were forced to make a final determination in this case before it has sufficient information on which to base a decision, the Commission would have little choice but to dismiss the case." *Id.* at 4.

The Court suspended the requirement for the FEC to file its monthly status reports while the DSCC's motion for summary judgment was in briefing and being considered by the Court. At the Status Conference on May 21, 1997, the FEC advised the Court of the following actions that had been taken since the fourth monthly status report: after informing the Court that Congress had denied the FEC's request for \$1.7M in supplemental appropriations and providing the Court with the FEC's Press Release of May 16, 1997, counsel advised that additional staff had been assigned to investigate the DSCC's administrative complaints, additional interviews and depositions had been conducted and additional subpoenas had been issued.<sup>3</sup> Counsel also reported that the respondents to the administrative complaint had opposed the FEC's discovery and that it was preparing to file a petition for subpoena enforcement in connection with one respondent's motion to quash. *See also* Letter to the Court from Lawrence M. Noble, FEC General Counsel (May 27, 1997) (filed by Order of the Court on May 28, 1997).

## II. Discussion

Because no material facts are in dispute, it is appropriate to resolve this matter on

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<sup>3</sup> Counsel did not provide the Court with the specific numbers of staff added, interviews or depositions conducted or subpoenas issued.

summary judgment. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510 (1986).

The Federal Election Campaign Act ("FECA" or the "Act") established the FEC and empowered it with the authority to investigate and enforce violations of the Act. See 2 U.S.C. § 437g(a). The Act permits any person to file an administrative complaint alleging a FECA violation, *id.* § 437g(a)(1), which triggers an administrative process designed to gather facts for the Commissioners to decide whether "reason to believe" exists to authorize an investigation. *Id.* § 437g(a)(2). If the Commissioners find that reason to believe exists, the Act provides that the FEC "shall make an investigation of [the] alleged violation, which may include a field investigation or audit, in accordance with the provisions of [section 437g(a)]." *Id.* § 437g(a)(2).

At the conclusion of an investigation, the FEC General Counsel is authorized to recommend to the Commissioners that it vote as to whether "probable cause" exists to believe that FECA has been violated. *Id.* § 437g(a)(3). The respondents are then notified (and given a copy) of the General Counsel's recommendation and provided 15 days within which to file a reply brief with the FEC. Upon consideration of the General Counsel's report and any briefs that may be filed by the respondents, the Commissioners, by a vote requiring at least four affirmative votes, determine whether probable cause exists. *Id.* § 437g(a)(4)(A)(i). Upon such a determination, the FEC must engage in conciliation efforts with the respondents for at least 30, but not more than 90, days. *Id.* If conciliation is not successful, the FEC may, upon an affirmative vote of four of its

Commissioners, file suit seeking injunctive relief and/or civil penalties. *Id.* § 437g(a)(6). Suits under the Act are subject to the general statute of limitations under 28 U.S.C. § 2462,<sup>4</sup> which bars the assessment and collection of monetary relief as a result of conduct occurring five years prior to the filing of a complaint. See Mem. Op. and Order at 8, *FEC v. Christian Coalition*, Civ. A. No. 96-1781 (JHG) (D.D.C., May 13, 1997). This statute of limitations does not, however, apply to equitable remedies available under the Act. *Id.*

Congress also provided authority for aggrieved parties to challenge judicially the FEC's failure to act on administrative complaints during the 120-day period commencing when the complaint is filed. 2 U.S.C. § 437g(a)(8)(A). If a court determines that the FEC's failure to act is contrary to law, the Court may direct the Commission to conform its conduct to the Court's declaration within 30 days. *Id.* § 437g(a)(8)(C); see *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990). The Act provides:

In any proceeding under [§ 437g(a)(8)] the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

*Id.* § 437g(a)(8)(C).

The issue presented in this case is whether, within the meaning of the Act, the FEC's actions in processing and investigating the administrative complaint filed by DSCC in February of 1993 are unreasonable and contrary to law. The standard for evaluating administrative delay is whether the agency has acted reasonably and in a

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<sup>4</sup> The parties appear to agree that this statute of limitations applies only to the government.

14-10 202 275 0530 JUDGE J.H. GREEN 011

manner that is not arbitrary and capricious. *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980). "Factors the Court may consider in making its determination include the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved." *Id.*; *Rose v. FEC*, No. 84-2778, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9218 (D.C. Cir. Order of Oct. 24, 1984) (approving factors outlined in *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980)); *TRAC*, 750 F.2d at 80 (listing factors relevant to reviewing agency inaction); *see also Rose v. FEC*, 806 F.2d at 1091-92 n.17 (in context of attorneys' fees litigation, applying *TRAC* factors to determine if FEC position was "substantially justified."). The *TRAC* factors are:

(1) the time agencies take to make decision must be governed by a "rule of reason," (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule, (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake, (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, (5) the court should also take into account the nature and extent of the interest prejudiced by the delay, (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.' "

*TRAC*, 750 F.2d at 80 (citations omitted).

While it is not the role of the Court to run the agency "or sit as a board of superintendence directing where limited agency resources will be devoted," *Akins v.*

*FEC*, 66 F.3d 348, 355 (D.C. Cir. 1995) (citing *FEC v. Rose*, 806 F.2d at 1091); accord *FEC v. DSCC*, 454 U.S. 27, 31-32, 102 S. Ct. 38, 42 (1981), this does not mean that the FEC can completely avoid judicial scrutiny by cloaking itself in the veil of prosecutorial discretion. It is true that “Congress did not impose specific time constraints upon the Commission to complete final action, but it did expect that the Commission would fulfill its statutory obligations so that the Act would not become a dead letter. It is perhaps too obvious to say that Congress intended the Act’s investigation and enforcement mechanism to be effective.” *DSCC I*, Mem. Op. and Order at 16 (citing H.R. Rep. No. 1239, 93rd Cong., 2nd Sess. 140 (July 30, 1974)). When Congress amended FECA’s enforcement provisions in 1979, Senator Pell, Chairman of the Committee on Rules and Administration, made a statement that reflected Congress’s concern that the FEC not shirk its responsibilities:

The Commission is entrusted with the responsibility of passing on complaints. . . . And to assure that the Commission does not shirk its responsibility to decide that [the judicial review] section provides that a total failure to act within 120 days is a basis for court action. But [this basis] for judicial intervention [is] not intended to work a transfer of prosecutorial discretion from Commission to the courts.

125 Cong. Rec. S19099 (daily ed., Dec. 18, 1979) (quoted in *Common Cause v. FEC*, 489 F. Supp. at 743-44).

While it is also true that there are no specific deadlines by which the FEC must make "reason to believe" or "probable cause" determinations, it is significant that the procedural deadlines outlined in the Act are stated in terms of days. *E.g.*, 2 U.S.C. §

437g(a)(1) ("Within 5 days after receipt of a complaint, the Commission shall . . ."); *id.* § 437g(a)(4)(A)(i) (conciliation attempts limited to maximum 90 days); *id.* § 437g(a)(4)(A)(ii) ("If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i)."); *id.* § 437g(a)(8)(A) ("Any party aggrieved by . . . failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed . . ."); *id.* § 437g(a)(8)(C) ("the court may declare that . . . the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days"); *see Rose v. FEC*, 608 F. Supp. 1, 6 (D.D.C. 1984), *rev'd on other grounds sub nom. In re Nat. Congressional Club*, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) ("All of these short deadlines reflect Congress's intention that the Commission generally act expeditiously . . ."); *see also DSCC I*, Mem. Op. and Order at 16-17 ("The absence of a specific requirement in the Act that the Commissioners make their finding within a certain time period is not the equivalent of unfettered FEC discretion to determine its own time line. Public confidence in our democratic electoral system, which the Act seeks to protect, turns on investigations that are conducted within a reasonable time and on effective enforcement.").

This Court has previously evaluated the FEC's delay in the events leading up to and including its "reason to believe" determination (over 21 months ago) by applying the *TRAC* factors. *See DSCC I*, Mem. Op. and Order at 10-12. That analysis applies equally

at this stage of the case to compel the conclusion that taking over four years from when the administrative complaint is filed, and almost two years from the FEC's "reason to believe" decision, to decide whether probable cause exists is unreasonable. Although this Court declined to enter summary judgment against the FEC last fall in this case (*DSCC II*), that decision in part reflected a recognition of the complexities added by the Supreme Court's then-recent decision in *Colorado Republican Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996), and the burdens of other FEC litigation.<sup>5</sup> At this stage, with its investigation proceeding at a "glacial pace," the FEC can milk those excuses no longer.

Whatever "unreasonable" means in terms of agency delay, it certainly embraces the situation here where the FEC concedes that it is likely that it will be unable to complete its investigation, make a probable cause determination and engage in the statutorily required conciliation efforts within the five-year statute of limitations period applicable to this case. The FEC's lament that this Court is depriving it of adequate time to complete its investigation rings hollow in this case: the plaintiff's administrative complaint was filed over four years ago. The time pressure felt now by the FEC is pressure of its own making by taking over six-hundred days to assign an enforcement attorney, by taking five more months to make a "reason to believe" determination, and by proceeding in the manner that it did over the course of the following 21 months in

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<sup>5</sup> This Court also recognizes that the FEC toils subject to the resource constraints imposed by Congress. While Congress, too, appears to recognize that FEC is inadequately funded, see 143 Cong. Rec. S2311, 2314, reprinted at 1997 WL 113684 (Cong. Rec.) (Mar. 14, 1997) (statement by Sen. Specter), Congress created, and has the power to amend, the statute that vests the FEC with its broad investigatory powers and its important responsibilities.

investigating the charges leveled by the DSCC against the NRSC. Litigation delays resulting from motions to quash FEC subpoenas are foreseeable and provide no excuse over this substantial period of time. This Court will not, as she cannot, manage the FEC's limited resources for it or tell the agency how it should exercise its prosecutorial discretion. But whatever discretion the FEC is allowed in matters implicating prosecutorial discretion and resource management, it has squandered by pushing the resolution of these high priority administrative complaints ("Tier One," even according to the FEC) to the very end of the statute of limitations period.

### III. Conclusion

Accordingly, it is hereby

**ORDERED** that the FEC's failure to take meaningful action in a reasonable time frame to investigate and make a "probable cause" determination with respect to the plaintiff's administrative complaints is contrary to law under 2 U.S.C. § 437g(a)(8)(C); it is

**FURTHER ORDERED** that the FEC shall conform its conduct with this declaration within 30 days; it is

**FURTHER ORDERED** that should the FEC fail to conform its conduct with this declaration within 30 days, the plaintiff may bring a civil action to remedy the violation involved in the original complaint pursuant to 2 U.S.C. § 437g(a)(8)(C); it is

**FURTHER ORDERED** that in accordance with Fed.R.Civ.P. 58, judgment shall be entered separately; and it is

**FURTHER ORDERED** that in accordance with Local Rule 215, the parties shall meet and confer, and attempt to reach agreement regarding the plaintiff's request, if any, for attorneys' fees and costs. On or before August 1, 1997, the parties shall advise the Court whether such agreement has been reached. If agreement has not been reached, the plaintiff shall file its motion for fees and costs under Fed.R.Civ.P. 54(d)(2) on or before August 15, 1997; the defendant shall file its opposition on or before August 29, 1997; and the plaintiff shall file its reply on before September 5, 1997.

IT IS SO ORDERED.

May 30, 1997.

  
JOYCE HENS GREEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL  
CAMPAIGN COMMITTEE,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 96-2184 (JHG)

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, and pursuant to Fed.R.Civ.P. 58, judgment is hereby entered in favor of Plaintiff Democratic Senatorial Campaign Committee and against Defendant Federal Election Commission.

IT IS SO ORDERED.

May 30, 1997.

  
JOYCE HENS GREEN  
United States District Judge